IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
ZOOBUH, a Utah Corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:11-CV-00516DN
	)	
BETTER BROADCASTING a Utah limited liability company, et al,	)	
	)	
Defendants.	)	
	)	
_____	)	

BEFORE THE HONORABLE BROOKE C. WELLS

March 30, 2016

Motion to Quash Subpoena

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Appearances of Counsel:

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Salt Lake City, Utah, March 30, 2016

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THE COURT: -- referred to me. This is ZooBuh versus Better Broadcasting, et al. May I ask counsel to make their appearances and anyone who is not counsel to be identified.

MR. SCHMUTZ: Chris Schmutz, Your Honor, on behalf of ZooBuh.

THE COURT: Mr. Schmutz.

MR. WRIGHT: Your Honor, Kasey Wright appearing on behalf of Blair Jackson and Invictus Law. And Mr. Jackson is here. And then Bill Knowlton representing Invictus Law.

THE COURT: All right. Thank you, gentlemen. This is your motion to quash the subpoena. I have read all of the submissions and believe I have an understanding of the underlying concerns. So feel free to say whatever you wish in the argument.

MR. WRIGHT: Thank you. I know you have read the pleadings, Your Honor, but just reviewing the information. I am talking too loud for this.

THE COURT: Um, we never know in this courtroom. Go ahead.

MR. WRIGHT: I apologize if it echoes. Plaintiff is seeking information for ten entities, two of which, only two of which, are actually parties to the case that he is involved with. But the bigger issue involving my clients,

of course, who are nonparties, is that he is seeking information from Mr. Jackson and from Invictus Law that seeks to force through subpoena my clients to violate, um, the rules of ethics for attorneys. And for all practical purposes, what he is trying to do is eviscerate the rules of attorney/client privilege that are so crucial to our judicial system.

For five years, Your Honor, the plaintiff has been involved in this case and apparently has sat on its hands in regards to conducting any type of discovery. And that is their choice. We don't care one way or the other what they do along that line. But now it seems like they're trying to make up for lost time by seeking information from my client which is clearly protected under the rules of ethics.

Since you have read, Your Honor, I will drop down to three reasons why this is clearly protected. But the most and I think the most important is under Rule 1.6 of the Utah Rules of Professional Conduct. In quoting from that it states, "a lawyer shall not," a lawyer shall not, "reveal information relating to the representation of a client unless the client gives informed consent." That's it. Period. A lawyer shall not and doesn't have the right to disclose that information.

Now, there is information -- there are exceptions as you go further down that rule. However, if you look down

those -- on those exceptions, those exceptions are the attorney's right, not a third-party's right, to come in. Rule 1.6(b) states that "the lawyer may reveal information to the extent the lawyer reasonably believes" and then it goes and identifies the information. It does not give that right to third parties if third parties reasonably believe. It is the attorney's right to prevent a crime, to prevent a fraud, all of those entities, but it is not third parties rights to jump in and make that decision.

And Rule 1.6 is clear that it doesn't just apply to attorney/client privilege information, it applies to all information that is given to the attorney. In Comment 3 of that rule it states, "the confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation whatever its source."

And this is, I think, reviewing the pleadings Your Honor what I want to focus on. Plaintiffs counsel in his pleadings indicates, well, this is -- there is an -- in one of the comments it talks about that this doesn't apply to things, that 1.6 only applies to issues not relating to force of law. He seems to imply that that means that 1.6 provides less protection than is provided in the attorney/client privilege and the work product doctrine. And the exact opposite is true, Your Honor. 1.6 is made to

provide additional protection for us in saying that this information simply does not go out. I'll give an example of that. In the opinion that was given in '97 opinion from the Bar 9702, that case involved a criminal and the defendant who had committed a crime who was on the run. He had contacted his attorney and stated I want to, um, I want to turn myself in. The attorney says okay, I'll work with you on that, give me your phone number and your information. And the defendant does that. And the attorney contacts the police, says we're going to work on this. Then the defendant loses contact with his attorney, doesn't follow through. The law enforcement goes to the attorney and says we want that information and the attorney says I can't give it out, that's protected. And even under threat of bringing criminal charges against the attorney, he says I can't give those up. So we are talking about force of law. And this makes my point that force of law, that law enforcement clearly could have issued an investigative subpoena, maybe did, maybe issued a warrant, all those things, but those did not say okay, if you take those types of discovery steps then you are no longer bound by this Rule 1.6 of confidentiality. No the opinion is no, the attorney can't give that information out. Even if it means after him being a defendant who is on the loose or, and I'll take that, even if it means that somebody that has committed a crime, stolen

a million dollars, committed a fraud, whatever the instance is that does not break the rule of 1.6 which is that an attorney shall not, shall not disclose this information, unless the attorney reasonably believes.

So I believe that this matter is shut open and closed with 1.6 alone or 1.9. Now I want to point out that at this point my clients have not indicated one way or the other whether they did represent the parties or they did not. And it would be a violation for them in fact to do so at this point.

And if the subpoena, and it were to become the standard practice of parties to issue subpoenas to attorneys to gain information in collection matters, it would have extremely detrimental effect on the attorney/client relationship which is designed to be protected through our judicial system. In fact, it would have a chilling effect because now all of a sudden attorneys are worried about whether information they gather, how do they gather it, how do they keep it, do they immediately destroy their file after a case because they don't want it coming back, and then clients, on the other hand, they're saying well I'm not going to give you this information even though it will help you in the representation of me because I don't want that to be subject to subpoena later on.

So what plaintiff is trying to do is first of all it

is unprecedented. In all of the years I have been doing this I have never heard of trying to get information from an attorney, and I think that is first and foremost because of the confidentiality. But also, imagine that all of a sudden attorneys would become the first source of information in a collection matter or any other type of matter. If I had represented a client in a divorce, and now all of a sudden there are creditors that say I want all of the information and I am going to subpoena you attorney, it just puts unreasonable duties on attorneys and really, really chills that relationship which is completely contrary to our justice system.

THE COURT: Let me ask this question, and this is for both parties, did any party seek any sort of ethics advisory opinion from the bar as it relates to this specific set of facts?

MR. WRIGHT: We did not. We looked at the advisory opinions.

THE COURT: Okay.

MR. SCHMUTZ: No.

THE COURT: All right.

MR. WRIGHT: Um, dropping down, Your Honor, and as I said I think that 1.6 on confidentiality discloses this. Now I'm going touch briefly upon attorney/client privilege and work product. Now these really are difficult to even

defend at this point because we're not saying whether we have represented them or not, but just as general process and how it goes against it, first of all, and it was pointed out correctly by plaintiff's counsel in his brief that yes because this was a default judgment he doesn't have to give the parties notice necessarily of the subpoena. But what it does bring is that the attorney/client privilege relationship that exists and right of those parties, they do have a right to exercise that. They haven't been notified. So even if that privilege does exist, they should be here to exercise that privilege and have that right before any information is disclosed. Similarly, my clients, as attorneys, also have that right which they would invoke. At this point, we can't even invoke it to a great extent because we're not saying it even existed. It's an odd situation. And the same applies with work product. But I did want to cite some language from a case which I think furthers the point of the importance of this confidentiality and attorneys being able to work freely and openly with their own clients and gather information. And it states, "the attorney work product doctrine shelters the mental processes of the attorney providing a privileged area within which he can analyze and prepare his clients" dropping down, it states, "it is essential that a lawyer work with some degree of privacy free from unnecessary intrusion by

opposing parties and their counsel." And I think that that is important to bring out is that not only is it free from opposing party and their counsel, but future opposing parties who may later come back and seek this information as we're seeing here. We don't want, again, attorneys limiting what they put down in paper, or clients wondering what they provided their client because they're afraid that at a later date it is going to be subpoenaed by an attorney.

Last, let me drop back to which I think is still important but is not nearly the importance to our judicial system at large as the first two issues I have referenced, but also is still important and that is, I think, that the subpoena violates Rule 26 and 45 of the Rules of Federal Procedure in that it's not proportional and it puts a burden on my client. Because as I stated, now all of a sudden attorneys become the first source of information. We're being required to go through our files, to go back and not -- and it's worse for an attorney, because we just don't go and pop your file because now we have got to go ahead and start making distinctions what's work product, what's attorney/client privilege, spending all of the time and resources when really there is easier ways to get that information. There is information that could be other entities that can be subpoenaed that that has it more readily available and does not put the strain on the

judicial system as this subpoena to us does.

Now based on recent filings, um, by plaintiff in this case, indicates that they're going try to focus and say hey there is a fraud that is occurring here and so this is what we need to take this extreme step. There is no exception for that in the law, Your Honor. There is no exception for the overburdening or whatever plaintiff thinks my client did or did not do, or when I say my client, these parties who may or may not be our clients, it's really irrelevant because that information, as I gave the example of the criminal matter, it's the attorney/client privilege, it's the burden it puts on attorneys as to why this most -- this subpoena needs to be quashed to protect that. And plaintiff can go through traditional sources of trying to collect this information and collect this debt.

Your Honor, finally, we would ask that in light of, as I said, the unprecedented step I believe that plaintiff is taking in this case, forcing my client to retain an attorney, to prepare to quash a subpoena, we would ask that pursuant to the Rules of Federal Procedure that we be awarded our attorney's fees and filing this motion to quash in defending against this subpoena.

Any questions, Your Honor?

THE COURT: No, thank you.

Counselor?

MR. SCHMUTZ: Your Honor, I believe that my esteemed opponent is overlooking the clear demarcation between Rule 1.6 and the attorney/client privilege that's set forth in Comment 3 to Rule 1.6.

Comment 3 says, I won't read the whole thing, it does say, "The attorney/client privilege and work product doctrine apply in judicial," which this is, "or other proceedings in which a lawyer may be called as a witness, or otherwise required to produce evidence concerning a client." That's exactly what's going on here. This is a situation where an attorney and a law firm are being asked, in a judicial proceeding, and required by subpoena, to produce evidence concerning potentially a client.

Then it goes on to say, "the rule of client lawyer confidentiality," that is Rule 1.6 cited by my opponent, "applies in situations other than those where evidence is sought from a lawyer through compulsion of law." So this language in Comment 3 clearly establishes that what we have here are two separate tracks, separate parallel tracks. Different rules apply in each one. In the situation where a lawyer is not subject to the process of law through subpoena, through being questioned on the witness stand, through being asked by subpoena to appear and give evidence, then Rule 1.6 applies. So attorneys can't voluntarily and for their own benefit provide information about their

clients to others. But in a situation like this one where a subpoena has been issued, a judgment needs to be collected, then they have information relevant to the assets and relationships that could lead to collection about judgment, then Rule 1.6 does not apply. Instead, attorney/client privilege, the case law, the rules of evidence relating to attorneys as witnesses kicks in. It applies exclusively and Rule 1.6 doesn't govern it. And I would ask the court to consider the simple fact that if my interpretation of Comment 3 were not right, if Comment 3 were not there, there wouldn't be a need for attorney/client privilege because the confidentiality rules in 1.6 are obviously broader than the protection afforded under the attorney/client privilege. Attorney/client privilege wouldn't even be needed nor would work product doctrine since if that were true, the attorneys could never be asked through subpoena to attend in court to answer questions under oath, and there wouldn't need be to an attorney/client privilege rule.

I would reference the court to the case law that makes it clear that Rule 1.6 does not apply. In this district Judge Boyce issued the *Lifewise* opinion. In that opinion he talked about the types of -- of information and documents that can be obtained from attorneys. And he talked about the limitations of attorney/client privilege which are quite a bit more stringent and less expansive in protecting

information than Rule 1.6 is.

We look at other cases. *Freebird, Inc.* from the Kansas Court of Appeals, the *Gold Standard* case right here in Utah, *Jackson*, another Utah case, um, *McCoo versus Denny's,* which is a Federal District Court of Kansas case, and the *Mountain Dudes* case that talks about information that can be obtained as well as *in re: Walsh*, a Seventh Circuit case from 1980. Those cases clearly demarcate that when an attorney is subpoenaed to provide information a lot of the information relating to the factual -- the facts of client/attorney relationships are not protected. Whether a person is a client is not protected by the attorney/client privilege. Whether a person met with an attorney at a particular time is not protected. Other things aren't protected.

THE COURT: But that somebody may have met with a client, that's factual in nature.

MR. SCHMUTZ: Correct.

THE COURT: All right. It might not necessarily invade the privilege, but the contents of those conversations it doesn't say that, does it?

MR. SCHMUTZ: I agree, Your Honor, and we're not seeking those. I concede that we're not entitled to know the communications between attorney/client.

THE COURT: But what is it, I read your document

request and it is very broad. So what is it exactly that you are seeking?

MR. SCHMUTZ: Primarily relationships, Your Honor, because relationships can lead to equitable remedies that can expand the sources from which the judgment can be paid.

THE COURT: So you're looking for information they may have about the company's assets?

MR. SCHMUTZ: Or who controls the company. We haven't been able to find out who controls these companies. Somebody, some individuals, are standing behind these companies directing unlawful activities and we want to know who they are.

THE COURT: What measures have you taken to find that out short of this?

MR. SCHMUTZ: Um, we have done everything that we could. Like, for example, we have looked on the records of the State of Utah. I have asked the court to take judicial notice of. No individuals are mentioned on any of these companies in the records of the State of Utah. Iono, which is one of the -- which is one of the defendant entities, is the only member and the only registered agent that's listed. We have also checked Iono is a Delaware entity and we found through our investigation that it -- it's registered agent back there is an entity called, I forget the name of it, but it is an entity in Delaware. We have contacted that entity.

The only information they were able to give us is that their contact in Utah is Blair Jackson.

THE COURT: Um, I ask and I saw in your response that you did not seek any advisory opinion from the Utah State Bar. And let me ask you why not?

MR. SCHMUTZ: Well, I think that the case law is clear, Your Honor. I mean Utah has case law on this subject. I cited the court to the -- just a moment, I'll check it here, to the *Jackson* case and to the *Gold Standard* case. In the *Gold Standard* case the court says very plainly, for example, an attorney/client agreement is not privileged. And so clearly information relating to the attorney/client privilege that's factual in nature is not protected by the attorney/client privilege and is subject to discovery.

THE COURT: But you're seeking, by your own admission, information concerning assets, for instance, and that would go past, that's far beyond what these cases, as I understand them, allow.

MR. SCHMUTZ: Uh-huh (affirmative). Okay and that takes us to the *Lifewise* case which is Judge Boyce's case. And in that case he talked about the -- the extent to which a judgment creditor can seek information from third-parties. And what Judge Boyce says in that case is very instructive for this case. He says that judgment creditor is entitled

to discovery, a judgment creditor is entitled to very thorough examination and that includes third-parties.

THE COURT: Was that case -- did it include attorneys?

MR. SCHMUTZ: No, that one did not include attorneys. So to me these are two different questions that the court is raising, both of which I think are important. One, the extent to which attorneys may protect information; and two, the extent to which judgment creditor can seek information from third-parties. *Lifewise* talks about the second category. That is the extent to which a judgment creditor can seek information from third parties. In that case, Judge Boyce said initially it is very broad standard. They can seek information from third-parties that may lead them to discover relationships or assets of the judgment debtor. Where there is a little bit higher standard is the question of if we are seeking to discover the assets of the third-party themselves which to a certain extent we are because we have asked for tax returns and bank statements.

Now on that level Judge Boyce says that the standard is not that much higher as long as you can show at least some demonstration of a potential alter ego relationship, or if there is a reasonable doubt, or if there is at least some demonstration or colorable suspicion or legitimate questions. Those are the types of things we have to show. I mean in our view what we have asked the court to take

judicial notice of is sufficient to raise questions about those entities whose only registered agent and member is a judgment debtor. That seems a situation where there might be an alter ego relationship, transferring back and forth of assets, and that meets that low standard as to those entities.

Now not all of the entities that we have named fit under that. And I would concede that with respect to M-Support and the two individuals that we have named in the subpoena we don't rise to that level and so I would concede that we shouldn't get their tax returns or bank statements at this point in time. But the others we have met the standard set by Judge Boyce. So that's -- that's that side of it.

THE COURT: Do any of your cases extend to attorney/client relationships?

MR. SCHMUTZ: Yes. Several of them. I would cite the court --

THE COURT: Which ones particularly?

MR. SCHMUTZ: Okay. Some are Utah cases, some are federal cases. In, um, the *Jackson* case, which is Utah case, it says that "the privilege, the attorney/client privilege, does not extend to documents that involve evidence of objective facts dealing with events, conditions, or circumstances, and not expert conclusions or a lawyer's

impressions. Non-privileged writings," this is *Jackson* also, "do not become privileged merely because they are delivered to an attorney." So in that category --

THE COURT: Give me the facts of that case.

MR. SCHMUTZ: That was a case -- if I could be excused for a moment.

THE COURT: Sure.

MR. SCHMUTZ: Your Honor, I don't have that one with me. But -- but just a second. That was a case where the plaintiff contended that cars in the parking lot were being injured by emissions from Kennecott's smelter. And so they sought discovery from Kennecott about the testing that had been done on their smelter and the standards that they achieved and how they tried to prevent the emissions. Kennecott refused to respond on the grounds that they had delivered those documents to their attorney and they were privileged by -- they were protected by the attorney/client privilege. The Supreme Court of Utah said no. It doesn't matter if they had been delivered to an attorney or if they're being held by an attorney, if by their nature they don't represent confidential communications, they are discoverable. That's what we're talking about here. We're looking for things like corporate resolutions, articles of incorporation, um, the kind of things that would identify and phone records that would help us to identify the

individuals that are controlling these two entities that we have a judgment against. And under that *Jackson* case, those records simply are not protected and they shouldn't be in this case either. Another example is the *Gold Standard* case which is another Utah case. In that case the Utah Supreme Court held that an attorney/client agreement is not protected since it's not confidential and doesn't contain confidential information. In the *Walsh* case which is Seventh Circuit 1980, the court said documents showing billing and payment history are not privileged, not protected.

THE COURT: Billing and payment history between a lawyer and a client?

MR. SCHMUTZ: Correct.

THE COURT: All right. How -- how is that the same as what you're asking?

MR. SCHMUTZ: We're asking for that.

THE COURT: Their billing to their lawyer?

MR. SCHMUTZ: Their billing --

THE COURT: Why is that relevant to your inquiry?

MR. SCHMUTZ: Because we hope it will show us who is controlling these two entities. We haven't been able to find anyone. None of the records that we found that are public records show any individuals. We would like to know who is directing the show, who is pulling the strings. The

only way to do that that we know of is through the attorney/client billing records. We're not interested in content, we're not trying to find out what they talked about, we're only trying to find out who they talked with.

THE COURT: Go ahead.

MR. SCHMUTZ: Okay. Um, same thing in the *Freebird* case which is the district -- or the Kansas -- that is the state court Kansas Court of Appeals, narrative statements and billing records, unless they were litigation strategy, are not protected. The way that the attorney/client privilege works as is outlined in these cases, Your Honor, is simply that it's -- the burden is on the attorney to identify content that reflects confidential communications. But the fact of meetings, who the attorney met with and when and where are not privileged. And so they are subject to discovery and hopefully they will lead us to discover those individuals who are in control of these companies and who may be able to help us find their assets or income or transfers of property.

THE COURT: Thank you.

MR. SCHMUTZ: You're welcome.

MR. WRIGHT: Rebuttal, Your Honor? Your Honor, couple of things. First of all, I think that counsel is misrepresenting these cases as they apply in the situation. Let's talk about *Jackson* in particular. Um, completely

different situation. In that situation, the parties were seeking to protect information because they had given it to their attorneys. That is vastly different than trying to get the information from the attorneys. In other words, the parties were working, their argument was simply hey this is now attorney/client privilege because we gave it to our attorneys, as I understand Mr. Schmutz's argument. That is not what's happening here. They are coming to the attorneys asking for the information. And in that case, clearly the parties had a chance to invoke privilege. Some of the other cases he has referenced, again, are separate and in those situations there is no question about whether the parties -- the attorneys were representing the parties. That was known and they were seeking for information particularly about that which is not this situation. It's completely different. And the court has asked about -- about seeking an opinion letter from the bar. And again, I think that the most on point, directly on point with this, is essentially is the opinion letter 9702 which addresses that issue which I talked about earlier. In that case they were seeking information from an attorney and had all the weapons or tools of prosecution that they could have got that information, investigative subpoena, warrants, all of that stuff. The opinion letter never references it. It is saying you don't have to give that information attorney.

And that is exactly what we're talking about here.

And then going to the point of well hey this isn't protected information, we just want to know who the owners and who is running that company is. That is confidential information. That can be part of a strategic plan of a business. That is absolutely confidential. Now if they can get it somewhere else through public records, whatever, they can get it, but they certainly can't come to the attorney to get that. They certainly can't come to the attorney and try to get the bylaws, the operating agreement, um, the articles. If those documents had been prepared by the attorney, and they're seeking to obtain them from the attorney, they are privileged information.

Essentially what plaintiff is trying to do he is trying to do a two-step process that would essentially eliminate attorney/client privilege. First he trying to say because we are trying to get this through legal means 1.6 doesn't apply. So we get around that hurdle. And now because we have got all these different exceptions that we think that once we're past that hurdle then we can get this information that we want either. That is not the point. Completely eviscerates the purpose of the attorney/client privilege.

THE COURT: Thank you. All right. Um, I'm prepared to rule and I find specifically that the movant here has met

its burden of showing that this information, if it exists, is confidential. I find that the cases cited by plaintiff are distinguishable from the facts of this case and therefore do not specifically apply. And, um, I also find that the subpoena requests are very overbroad. I am not convinced about the burdensome issue, um, you know, but I don't think we reach that. I find that 1.6 does apply and that this is an unwarranted invasion of the attorney/client privilege.

So with regard to attorneys fees, um, I think that this could have been resolved through requests for an ethics advisory opinion and that would have minimized the costs of hiring counsel and bringing the matter before the court. I am not concerned about judicial expediency, but I am concerned about the cost to bring this matter, and I am going to award attorney's fees. And Mr. Wright, I want you to do several things. I want you to prepare a proposed order with findings and conclusions consistent with my statements here today, and I also want you to submit an affidavit of costs that I will consider in awarding the fees.

Um, Mr. Schmutz, I just think that this is the improper way, and there must be other ways to find out this information without invading the attorney/client privilege. All right? Okay. Thank you all very much. We're in

recess.

(Whereupon, the hearing concluded.)

REPORTER'S CERTIFICATION

I hereby certify that the foregoing transcript was taken from a tape recording stenographically to the best of my ability to hear and understand said tape recording, that my said stenographic notes were thereafter transcribed into typewriting at my direction.

Dated this 27th day of April, 2016.

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Laura W. Robinson